BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILLY LYNN JOHN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,744
TYSON FOODS	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY UNKNOWN	)	
Insurance Carrier	)	

ORDER

Claimant appeals the November 3, 2009, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was denied workers compensation benefits after the ALJ determined both that claimant's accident occurred in Illinois and that claimant was hired to work out of Arkansas. The ALJ found that the Kansas Workers Compensation Act (Act) did not apply to this claim.

Claimant appeared by his attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent appeared by its attorney, P. Kelly Donley of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held November 3, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Are claimant's accident or accidents covered by the Act? Claimant argues that he was hired while he lived in Salina, Kansas, and also that his principal place of business was in Kansas. Therefore, the accident, which occurred in Illinois, should be covered by the Act. Claimant also alleges that he suffered additional injuries while he drove his truck through Kansas on a regular basis and this should also

allow jurisdiction under the Act in Kansas. Respondent alleges claimant's hire actually occurred after claimant traveled to Arkansas to respondent's corporate headquarters.

2. Did claimant suffer a series of accidental injuries which arose out of and in the course of his employment with respondent through September 12, 2009? Respondent denies that claimant suffered a series of accidents through his last day with respondent on September 12, 2009.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

While on vacation with his wife, claimant, a truck driver, stopped in at respondent's offices in Arkansas to inquire about a job. At that time, claimant and his wife determined that they did not desire to live in Arkansas and a job with respondent was not appropriate for claimant. Sometime later, claimant received a telephone call from respondent, inquiring if claimant was still interested in a truck driving job. Claimant answered in the affirmative and was instructed to go to respondent's corporate headquarters in Arkansas where he completed an application, underwent orientation, submitted to a drug screen, performed a driving test, provided respondent with proof of his CDL and passed all required training. Claimant was then hired to drive for respondent. Claimant continued to live in Salina, Kansas, and was initially dispatched out of Springdale, Arkansas. When respondent purchased IBP, Inc., in about 2005, a dispatch center was opened in Olathe, Kansas. This center only remained open for one and a half to two years and was then closed for economic reasons. Claimant was then, again, dispatched out of Arkansas. Claimant regularly traveled across the United States and only returned to Kansas two to three times per month and then only for one to two days per time.

On January 10, 2009, claimant was making a delivery in Illinois when he slipped on ice and fell. Claimant notified respondent of the accident, but claimant declined medical treatment. Claimant's condition improved somewhat over the next several months. However, in July 2009, claimant's back began to feel worse. Claimant was scheduled to go on vacation on September 13, 2009. Claimant's last day worked with respondent was September 12, 2009. On September 13, claimant's back pain worsened considerably, and claimant went to the emergency room at the Salina Regional Health Center. Claimant then came under the care of James J. Shafer, M.D., with Comcare. Dr. Shafer determined that claimant needed to see a specialist. Respondent then provided claimant a list of three physicians from which he was to choose his authorized treating physician. Claimant chose Timothy E. Stepp, M.D., of The Kansas City Neurosurgery Group, LLC. Dr. Stepp examined claimant on September 28, 2009, and after reviewing

an MRI, diagnosed a central and right-sided disc herniation at L4-5. The history provided Dr. Stepp mirrored the history given to the emergency room personnel. This included the initial fall in January 2009, with a gradual improvement and, after about four months, a worsening of his back pain. The pain never fully resolved. In his September 28 report, Dr. Stepp answered claimant's inquiry regarding the cause of his ongoing and current symptoms. Dr. Stepp opined that claimant's current symptoms stemmed from the fall on January 10, 2009. There is no medical opinion in this record supporting claimant's allegations of a series of microtraumas through September 12, 2009.

PRINCIPLES OF LAW AND ANALYSIS

Jurisdiction is conferred on the Kansas Workers Compensation Division where: "(1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless the contract otherwise specifically provides . . . ."[1]

The Board must first consider where the contract was "made." The contract is "made" when and where the last necessary act for its function is done.[2] When that last necessary act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.[3]

In this instance, claimant was contacted by respondent by telephone regarding a job as a truck driver while claimant was at his residence in Salina, Kansas. However, claimant was then required to travel to Arkansas, to respondent's headquarters, where several tests were administered and claimant was required to go through orientation. Only after all requirements were satisfactorily met was claimant hired as a truck driver for respondent. This Board Member finds the last act necessary to form the contract occurred while claimant was in Arkansas. This would not allow the Kansas Act jurisdiction over this matter.

Claimant next alleges that Kansas is his principal place of employment, which would confer jurisdiction in this instance. Claimant is correct that it is the principal place of employment of the employee that decides jurisdiction, and not the employer.[4] The Kansas

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[1] K.S.A. 44-506.

[2] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

[3] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

[4] *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

Court of Appeals addressed a matter similar to this in *Speer.*[5] In *Speer*, the claimant was a truck driver working for Bob Wilbur, an owner operator of a semi-truck which was leased to the respondent, Sammons Trucking. When Mr. Wilbur died, Speer then applied to Sammons as a driver. Speer was hired after traveling to Montana where he underwent orientation and signed the appropriate papers, passed a drug test and picked up a company truck. Speer regularly traveled across the United States, only returning to Wichita, Kansas, his home town, about 30 days per year. When Speer suffered a work-related injury in San Francisco, he filed a claim in Kansas alleging that Kansas was his principal place of business. The Court determined that Speer was only in Kansas on occasion, his base of operations was either in Texas or Montana and he spent long stretches traveling throughout the United States without returning to his home. Here, claimant was hired in Arkansas, traveled throughout the United States, only returning to Kansas on occasion and then only for brief periods. This Board Member finds that claimant, in this instance, is in a similar circumstance to Speer. The limited contacts with Kansas do not justify a finding that Kansas is claimant's principal place of business.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[8]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his

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[5] Speer v. Sammons Trucking, 35 Kan. App. 2d 132, 128 P.3d 984 (2006).

[6] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 2008 Supp. 44-501(a).

> employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[9]

Claimant contends that he suffered a series of accidents through September 12, 2009, his last day worked. However, the only medical opinion in this record is that of Dr. Stepp, who stated in his September 28 report that claimant's ongoing problems stem from the January 10, 2009, accident in Illinois. There is no evidence of a series of accidents or a worsening from claimant's continued driving for respondent through his last day worked. This Board Member finds that claimant has failed to satisfy his burden that the Kansas Act allows jurisdiction in this instance. The denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that the Kansas Workers Compensation Act applies to this matter. The denial of benefits by the ALJ should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated November 3, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[10] K.S.A. 44-534a.

Dated this ____ day of January, 2010.

HONORABLE GARY M. KORTE

c: Brian D. Pistotnik, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent
John D. Clark, Administrative Law Judge